



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Picker International, Inc.

File: B-249699.3

Date: March 30, 1993

Paul Shnitzer, Esq., and Robert P. Davis, Esq., Crowell & Moring, for the protester.
Robert H. Klein, Jr., Esq., for General Electric Medical Systems, Inc., an interested party.
Michael Trovarelli, Esq., and Mary E. Clarke, Esq., Defense Logistics Agency, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly determined not to consider additional technical data submitted immediately prior to the due date for best and final offers, because the agency evaluators concluded that they could not reliably interpret the data without conducting further discussions with the offeror.
2. Protester has no basis to challenge agency's consideration of competitor's alternate proposal submitted during negotiations where the agency also considered an alternate proposal that the protester submitted during the course of those negotiations.
3. Protester's mere disagreement with the agency's reasoned technical judgment does not constitute a valid basis to challenge the agency's evaluation of technical proposals.

DECISION

Picker International, Inc. protests the award of a contract to General Electric Medical Systems, Inc. (GE) for high-performance computed tomography (CT) scanner systems under request for proposals (RFP) No. DLA120-91-R-1522, issued by the Defense Logistics Agency (DLA). Picker contends that the agency improperly considered GE's late alternative

proposal, while refusing to consider data that Picker submitted shortly before the due date for best and final offers (BAFOs). Picker also challenges the agency's technical evaluation of its proposal in certain areas as well as the agency's alleged failure to give adequate weight, in the source selection decision, to the price differential between Picker's and GE's proposals.

We deny the protest.

The agency issued the RFP on May 2, 1991, for three types of CT scanner systems--basic, standard, and high performance--each of which was to be separately awarded. The contracts at issue are firm, fixed-price requirement contracts for a 1-year base period with two 1-year options.

The RFP states that technical factors are more important in the source selection than price, with award to be made to the responsible offeror whose proposal conforms to the requirements of the RFP and is "most advantageous" to the government. The RFP sets forth the technical factors, in descending order of importance, as follows: technical approach; maintenance, product, technical, and customer support; approach to contract management; and qualifications and production capability.

The RFP includes the provision at Federal Acquisition Regulation (FAR) § 52.215-10, which states that late proposals will not be considered (except in situations not relevant here). This clause further provides that modifications to proposals are subject to the same conditions. In defining "modifications," the FAR exempts "normal revisions of offers made during the conduct of negotiations by offerors selected for discussion." FAR § 15.412(a).

By the August 2, 1991, initial date for receipt of proposals, offers had been received from Picker, GE, and a third company.¹ The technical evaluation panel (TEP) evaluated the proposals during the course of September 1991. Written discussions were conducted through letters sent to all three offerors.

In an October 4, 1991, letter, Picker offered the agency an additional product as an alternate proposal for the standard-level performance systems. Picker described the alternate proposal, which offered fewer features than the

¹The third company's proposal was eventually eliminated from the competitive range.

initial proposal, as a "variation" of that earlier proposal. DLA evaluated the alternate proposal and conducted discussions with Picker concerning it.

On February 14, 1992, GE proposed its HiSpeed Advantage system in what the company termed an additional and alternative proposal for the high-performance systems. In the February 14 submission, GE stated that this proposal reflected improvements in technology that the company had developed in the more than 8 months since the issuance of the RFP. GE has described its alternate proposal as "modifying" its initial proposal and as an "upgrade" that is part of the company's "continuum" of products. The agency decided to review GE's submission, and later conducted discussions with GE concerning the alternate proposal.²

While DLA was conducting its review of GE's alternate proposal, the agency requested BAFOs for the standard and basic level systems in March 1992. For both of these systems, the agency conducted a cost/technical tradeoff, because in each case Picker's product was less expensive, but also less highly rated technically, than GE's. For the basic level systems, the agency concluded that the price premium for GE's product was not justified, and award was therefore made to Picker. For the standard level systems, the agency concluded that the technical superiority of the GE system was worth the price premium and GE therefore was awarded the contract for those systems.³

²As a result of the review of GE's alternate proposal, the agency issued amendment 0006 to the RFP on June 10, 1992. That amendment made minor changes in the specifications for the high-performance scanner systems. The agency has indicated that, although the amendment was issued as a consequence of review of GE's alternate proposal, the amendment had no impact on the evaluation and amounted to nothing more than a "clean-up" of "very minor" technical issues in the specifications. Picker has not alleged that this amendment had any impact on the source selection process.

³Picker protested this award to GE in a protest which our Office dismissed as untimely on September 4, 1992, because it was grounded entirely on information known to Picker immediately after award, which was more than 10 days before the protest was filed. See 4 C.F.R. § 21.2(a)(2) (1992).

In a June 16, 1992, letter, the agency informed offerors that negotiations for the high-performance systems were concluded, and requested submission of BAFOs by June 19, 1992. GE submitted two BAFOs, one for the system it originally proposed and one for the system it proposed as its alternate proposal. Picker submitted one BAFO.

Two days before the BAFO due date, Picker submitted one page of new technical data and one X-ray film containing Picker and CATPHAN phantom images. The cover letter to the submission stated that the new information was being submitted in response to the June 10 RFP amendment. The data appeared to indicate better performance than the information which Picker had previously provided to the agency. The contracting officer relayed the new technical submission to the TEP chairperson, who in turn shared the data with the other members of the TEP. The contracting officer directed the TEP chairperson to consider the new information only if it was complete and did not require further discussions with Picker. The unanimous judgment of the TEP was that the new information could not be evaluated without additional data from Picker. In particular, the TEP expressed concern that the submission did not explain how the new data's modulation transfer functions were calculated, and that the X-ray images were not AAPM phantom images.⁴ Based on the opinion of the TEP, the contracting officer determined not to take Picker's supplemental data into account and thus not to revise the technical evaluation of Picker's proposal.

As with the basic and standard level systems, source selection for the high-performance systems required the agency to perform a cost/technical tradeoff. Picker's BAFO was significantly less expensive than GE's alternative proposal.⁵ However, while GE's BAFO was rated highly acceptable for all four technical factors, Picker's BAFO received only an acceptable rating for its technical approach. Although Picker's BAFO was rated highly

⁴AAPM refers to the American Association of Physicists in Medicine. The RFP calls for the use of AAPM phantoms and states that, "[d]ue to the variability in phantoms, each [offeror] must comply with the requirements cited in the solicitation using the particular phantoms and performance criteria specified"

⁵Because GE's alternate proposal formed the basis of award, the narrative does not discuss GE's originally proposed system further, and the following discussion of GE's proposal refers to the alternate system.

-acceptable for the other three technical factors, the RFP's heavier weighting of technical approach led the evaluators to conclude that Picker's proposal merited only an acceptable score as its overall technical rating.

The source selection authority (SSA) conducted the cost/technical tradeoff. In the SSA's written analysis, he analyzed the specific technical advantages of GE's proposal and concluded that those advantages merited paying the price premium. That analysis focused on the subfactors within the technical approach factor. The SSA noted that GE's proposal received a highly acceptable rating for each of those subfactors, while the Picker product received only an acceptable rating for each.

Specifically, as to image quality, the SSA noted that the GE product exceeded the specification requirement for low contrast detectability and high resolution using a 1-second scan. The evaluators had concern about the Picker product's compliance with the specifications in this regard. The SSA concluded that GE's superior image quality in these quick scans was significant for the agency. For example, the SSA noted that, in work with children, fast scanning helps overcome the problems caused by the inability to keep the patients still.

Regarding user considerations, patient throughput, scanner system configuration, and turnkey installation as well, the SSA cited specific technical advantages of the GE product and related those advantages to the agency's needs. For example, GE's superior software was said to speed up interventional procedures, an advantage within the area of user considerations; GE's patient throughput was found to be very high, thus decreasing examination time; and GE's scanner system configuration was found superior due to a more versatile and larger online storage of raw data and reconstructed images.

On this basis, the SSA determined that the price premium associated with GE's proposal was warranted by the technical superiority of the system in key performance areas. Accordingly, the SSA concluded that GE's proposal represented the "best value" to the government. After GE's system successfully performed an operational capability demonstration, award was made to GE on September 18, 1992.

Picker was notified, on the date of award, of the particular GE model that had been the basis of award as well as the contract price. At a debriefing held on September 30, 1992, the agency stated that Picker's product had been rated highly acceptable in all categories except technical approach, where it was rated acceptable, and that Picker's technical approach rating was the basis for the agency's

preferring GE's higher priced systems. Among other specific aspects of the evaluation, Picker also learned at the debriefing of the agency's decision not to consider the additional data which Picker submitted immediately prior to the due date for BAFOs; the agency's understanding that Picker's scan cycle time was 10 seconds; and the specific areas in which Picker's proposal was assigned an acceptable score. Picker protested to our Office on October 13, 1992.

Picker contends that the agency's finding that GE's proposal was technically superior to Picker's was irrational and had no basis in fact. Specifically, the protester alleges that the agency evaluation was based on a failure to read the literature provided by Picker as well as inaccurate and inconsistent analysis. In addition, Picker argues that the agency acted unreasonably in deciding not to consider the information Picker submitted just prior to the due date for BAFOs, because, in Picker's view, the information should have been understood by any competent radiologist or physicist. Picker also challenges the agency's decision to consider GE's alternate proposal, which the protester characterizes as a late proposal.⁶ Picker views the agency's handling of that submission by GE as inconsistent with the agency's refusal to consider the data that Picker offered shortly before submission of its BAFO. Finally, Picker contends that the record fails to indicate any reasoned justification for paying the substantially higher price of GE's proposal. We address each of these protest grounds in turn.

THE DECISION NOT TO CONSIDER PICKER'S SUPPLEMENTAL DATA

Picker contends that the agency should have considered the supplemental data that it submitted during the period for BAFO submissions. Picker recognizes "the risks usually attendant upon an offeror who alters its proposal at BAFO," but argues that the meaning of its submission should have been clear to the agency, and that the agency's reasons for not considering the supplemental data are specious.

Agencies are not required to reopen discussions in response to BAFOs, and an offeror that revises its proposal at BAFO does so at its peril. See J.G. Van Dyke & Assocs., B-248981; B-248981.2, Oct. 14, 1992, 92-2 CPD ¶ 245. Picker's supplemental information falls within this rule. The agency's technical evaluators reviewed the supplemental data and concluded that they could not reliably interpret the data without conducting further discussions with Picker. Notwithstanding Picker's argument that the agency's

⁶Picker first learned the date of submission of GE's alternate proposal through review of the agency report.

technical personnel should have been able to interpret the supplemental data, we find nothing unreasonable in the evaluators' caution. The information that Picker submitted at the last minute was presented without explanation or clarification, and relied on phantoms other than the AAPM phantoms required by the RFP, thus raising questions about the applicability of the data. Accordingly, we conclude that the agency properly declined to revise the technical evaluation of Picker's proposal, despite receipt of the supplemental data.

THE DECISION TO CONSIDER GE'S ALTERNATE PROPOSAL

Picker contends that the agency was barred by the RFP provision governing late proposals, FAR § 52.215-10, from considering GE's alternate proposal. Essentially, Picker is arguing that GE's alternate proposal was not a normal revision made during the conduct of negotiations, see FAR § 15.412(a), and therefore could not be submitted other than in response to an invitation to all offerors to submit revised proposals.

We need not resolve this issue because Picker was afforded the benefit of the same treatment to which it now objects and therefore cannot claim to have been prejudiced by DLA's actions. In response to this RFP and during the course of negotiations, Picker submitted an alternate proposal (albeit for the standard-performance systems), just as GE did for the high-performance systems. The agency considered Picker's alternate proposal and used it as the basis of discussions with the company. The integrity of the protest process does not permit a protester to argue the unreasonableness of an agency's interpretation of the governing regulations where the protester itself clearly shared and, indeed, benefited from that interpretation during the procurement. See Xerox Corp., GSBGA 9862-P, 89-2 BCA ¶ 21,652, at 108,923, 1989 BPD ¶ 68, at 21 (reaching the same conclusion with regard to the interpretation of a solicitation provision). Picker cannot reasonably contend that it was prejudiced by the agency's permitting GE to do what Picker itself had previously done under the same solicitation. Prejudice, however, is an essential element of every viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

Picker would differentiate the two situations on the theory that its alternate proposal was simply a variant of its initial proposal, while GE's alternate proposal was completely new. There is no basis for this distinction. The record does not establish that GE's alternate system was so different from its initial proposal that it could reasonably only be viewed as completely new. Moreover, even if Picker could show that GE's two proposals were

Significantly different from one another, Picker has not established that this difference is of a different order of magnitude from the degree of change between Picker's initial and alternate proposals. Certainly, the fact that GE's alternate proposal represented an upgrade of the company's initial proposal, whereas Picker's constituted a less sophisticated version of its initial proposal, cannot in itself mean that one was permissible and the other not. Nothing in the FAR requires that proposal upgrades and downgrades be handled differently.

Accordingly, we find that DLA treated Picker and GE equally regarding the consideration of their respective alternate proposals submitted during the course of negotiations. We therefore deny for lack of prejudice Picker's challenge to the consideration of GE's alternate proposal.'

THE TECHNICAL EVALUATION

In reviewing a protest against an agency's evaluation of technical proposals, it is not the function of our Office to independently evaluate proposals and to substitute our judgment for that of the agency. Research Analysis and Maintenance, Inc., B-242836.4, Oct. 29, 1991, 91-2 CPD ¶ 387. We will question an agency's technical evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria listed in the RFP. Id. We will sustain a challenge to an agency's judgment incorporated in a technical evaluation where that judgment lacks a rational basis, such as where it is devoid of support in the record

'Equally without foundation is Picker's other allegation of prejudice--that it is being punished for complying with the FAR in that it provided its additional data during the BAFO submission period. This argument fails for at least two reasons. First, it assumes, factually, that Picker could have submitted the additional data earlier, but refrained from doing so. Picker has not alleged, however, that the supplemental information was actually available earlier. Second, even if the additional information were available earlier, Picker's claim of prejudice turns on the assumption that the company refrained from submitting the information because it believed it was not permitted to do so. Yet, since Picker plainly understood that DLA would consider an alternate proposal submitted during negotiations, it could not have reasonably understood that submission in that timeframe of additional data regarding an existing proposal was prohibited. Whatever the reason for the precise timing of Picker's submission of the supplemental data, there is simply no basis to conclude that Picker refrained from submitting the data earlier in order to comply with the FAR.

Before the agency or, indeed, contradicted by that record. See, e.g., Northwest EnviroService, Inc., 71 Comp. Gen. 453 (1992), 92-2 CPD ¶ 39; Bendix Oceanics, Inc., B-247225.3, July 27, 1992, 92-2 CPD ¶ 54. The fact that a protester disagrees with an agency's judgment, however, does not itself establish that that judgment is unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Picker's challenge to DLA's technical evaluation is limited to the four subfactors within the technical approach factor: image quality, user considerations, patient throughput, and system configuration.⁸ As explained above, GE's proposal received a highly acceptable rating for each of those subfactors, while the Picker product received only an acceptable rating for each. It is that rating differential which forms the basis of Picker's challenge to the technical evaluation--Picker essentially argues that its system is as good as, or better than, GE's system.

Picker offers the affidavit of a consultant as the basis for its challenge to the scoring of each of these subfactors.⁹ Our analysis indicates, however, that in each evaluation area, Picker's consultant's challenges to the agency's evaluation either depend on the supplemental data Picker submitted immediately prior to BAFO, or reflect disagreement with the agency's technical judgment, without demonstrating that the agency lacked a reasonable basis for its judgment. To the extent that the protester's allegations are based on the supplemental data that Picker submitted immediately

⁸The agency requests that Picker's challenges to the technical evaluation be dismissed as untimely. We decline to do so. Unlike the protest against award of the standard performance system, here, the debriefing first provided Picker with specific grounds of protest of which the company was previously unaware. In particular, the protester learned for the first time at the debriefing of the agency's decision not to consider the new data submitted just prior to the BAFO due date. Because that decision, which was timely challenged, is inextricably linked with many of the contested aspects of the evaluation, we find that the challenges to the technical evaluation are timely.

⁹Although our analysis tracks the affidavit of Picker's consultant, we note that, during the course of the protest, Picker's pleadings appeared to raise other issues. Those other issues are generally subsumed within the scope of the consultant's affidavit, and remaining issues raise peripheral matters or minor inconsistencies in the agency's position. We have reviewed those additional issues, which we do not believe require further discussion here, and find that none could justify sustaining the protest.

-prior to the BAFO due date, those allegations fail, because, as explained above, the agency acted properly in determining not to consider that supplemental submission. As detailed below, the remaining challenges to DLA's evaluation essentially amount to disagreement with the agency's technical judgment, without any showing that the agency's judgment lacked a reasonable basis.

Thus, in the area of image quality, Picker's consultant relies on Picker's supplemental data as a basis for challenging the high resolution image performance rating, and apparently the low contrast detectability rating as well. In particular, it is the supplemental information which forms the basis of his rejection of one of the agency's primary concerns, namely the Picker scanner's alleged inability to satisfy the specification requirements for image quality using a 1-second scan time. As to standard scan image performance, another component of image quality, while Picker's consultant would assign a score indicating the GE system was superior to Picker's, he would decrease the GE proposal's point advantage by one point. He does not provide any clear basis for this disagreement with the agency other than his reliance on the data Picker submitted immediately prior to the BAFO due date. Picker's consultant does not challenge the agency's evaluation regarding Picker's clinical images.

For the next evaluation subfactor, user considerations, Picker's consultant simply asserts that "technologists, who are used to the Picker Scanner, like it very much." He offers no other basis for his disagreement with the agency's judgment that led to the low rating Picker received under ease of operation. In particular, he provides no basis to challenge the agency's conclusion that the GE system's use of ergonomically designed consoles and simple operational commands facilitates technician training. Similarly, Picker's consultant would replace DLA's higher rating for GE's proposal under system design and operation with his "slight" preference for Picker's system, because the Picker system allegedly is more compact and requires less floor space. He provides no further reason to challenge the agency's judgment in the area of system design and operation, and does not refute the agency's conclusion that GE's system has an advantage over Picker's system in that GE's system provides simultaneous scanning and computer processing.

Concerning image recording and archiving, Picker's consultant simply expresses a conclusory disagreement with the agency's technical judgment by stating that, as between the two competing systems, "there is no difference, as both scanners have auto-filming and auto-archiving capabilities." He does not challenge the agency's point-by-point

explanation for its conclusion that there are differences between the two systems. In the mechanical area, Picker's consultant would assign a higher score to Picker than to GE apparently based solely on his reading of GE's technical data sheets. From those sheets, he concludes that, while GE's scanner can accommodate a patient weighing up to 450 pounds, the scanner may not meet the positional accuracy specifications for patients who weigh more than 400 pounds, and that Picker's system may therefore have a marginal advantage when working with patients weighing between 400 and 450 pounds. Picker's consultant does not suggest that Picker's alleged superiority in this area should be accorded more than minimal significance. In this area (as with other points), Picker's consultant fails to offer any basis for disputing the agency's position that, in terms of the actual clinical benefit to be derived from the competing systems' features, GE's system was superior to Picker's.

As for the third evaluation subfactor, patient throughput, Picker's consultant does not challenge the agency's ratings finding GE's proposal superior under scanning parameters or the two companies' proposals equal under image access and display. While Picker's consultant disputes GE's superiority under image reconstruction and reformatting times, his conclusion is explicitly based on the additional data submitted immediately prior to the BAFO due date.¹⁰

For the fourth and fifth evaluation subfactors, scanning system configuration and turnkey installation, Picker's consultant does not dispute the agency's ratings.

In sum, for each of its challenges to the technical evaluation, Picker has provided no indication, other than through reliance on the data submitted immediately prior to the BAFO due date, that the agency's evaluation was unreasonable. Accordingly, we deny this basis of protest.

THE COST/TECHNICAL TRADEOFF

Agencies have the discretion, in making their source selection decisions, to trade cost savings for technical benefits, with that discretion constrained only by the requirement that the agency's determination be rational and consistent with the solicitation's evaluation criteria. See

¹⁰In this regard, we note that Picker disputes the agency's conclusion that its system's scan cycle time is 10 seconds; Picker claims that the correct time is 6 seconds. (Although either speed is technically acceptable, a 6-second scan time is preferable.) Our review of the record indicates that the agency did not act unreasonably in understanding Picker's proposal to indicate a 10-second scan time.

Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 169. The label "best value," although much in vogue today, neither broadens nor narrows the agency's margin of discretion to conduct such a tradeoff. In a best value procurement, as with any cost/technical tradeoff, there is no requirement that selection of higher priced proposals be justified through an exact quantification of the dollar value to the agency of the proposal's technical superiority.

Because Picker has not raised a meritorious challenge to DLA's evaluation of the proposals in this procurement, there is no basis to challenge the agency's determination that the technical benefits of GE's proposal were worth the additional cost. We emphasize, in this regard, that the agency properly based its cost/technical tradeoff on the perceived value to the agency of the technical features of GE's proposal, rather than on the mere quantum difference in the two proposals' evaluation point scores. See Grey Advertising, Inc., supra. Moreover, that tradeoff decision is supported by contemporaneous documentation to the effect that the price premium associated with GE's proposal was reasonable and appropriate in light of the technical superiority of the system in certain key performance areas. Accordingly, we conclude that DLA properly considered price and performed a reasonable cost/technical tradeoff.

The protest is denied.



for James F. Hinchman
General Counsel